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No. 87-876

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In the Supreme Court of the United States

OCTOBER TERM, 1987

RONNIE O. KITCHENS, ET AL., PETITIONERS

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Due Process Clause requires the Secretary of Health and Human Services to compel states participating in the Aid to Families with Dependent Children (AFDC) program (42 U.S.C. (& Supp. III) 601 *et seq.*) to notify persons that they have been identified in applications for AFDC assistance as the fathers of children born out of wedlock.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 825 F.2d 1337. The opinion of the district court (Pet. App. B1-B9) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A23) was entered on August 20, 1987. The petition for a writ of certiorari was filed on November 14, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Aid to Families with Dependent Children (AFDC) part of the Social Security Act (Title IV, Pt. A of the Act, 42 U.S.C. (& Supp. III) 601 *et seq.*) establishes a

cooperative federal-state assistance program. States participating in the program provide financial support to needy dependent children and the persons who care for them, and the federal government partially reimburses the states for the expenses they thereby incur (42 U.S.C. (& Supp. III) 602(a)). The AFDC program is designed to "encourag[e] the care of dependent children in their own homes * * * and to help [those children's] parents or relatives to attain or retain capability for the maximum self-support and personal independence * * *" (42 U.S.C. 601).

Although participation in the AFDC program is optional, a state that seeks to obtain federal reimbursement for AFDC expenses must formulate and administer an assistance plan that conforms with the requirements of the statute and with the implementing rules and regulations of the Secretary of Health and Human Services (42 U.S.C. (& Supp. III) 602(a); see also 45 C.F.R 201.0 *et seq.*). The state must, for example, provide that "aid to families with dependent children shall * * * be furnished with reasonable promptness to all eligible individuals" (42 U.S.C. (& Supp. III) 602(a)(10)(A)). It must also provide that the appropriate state child-support collection agency will be promptly notified whenever AFDC benefits are furnished to a child who has been deserted or abandoned by a parent, including a child born out of wedlock (42 U.S.C. (& Supp. III) 602(a)(11)). In addition, it must provide that, as conditions of eligibility for aid, each applicant or recipient will be required to assign to the state "any rights to support from any other person such applicant may have * * * which have accrued at the time such assignment is executed" (42 U.S.C. (& Supp. III) 602(a)(26)(A)), and "to cooperate with the State (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) in obtaining

support payments for such applicant and for a child with respect to whom such aid is claimed * * *" (42 U.S.C. (& Supp. III) 602(a)(26)(B)). The state must also show that it has in effect a plan approved under the Child Support Enforcement (CSE) program, Title IV, Pt. D of the Social Security Act, 42 U.S.C. 651 *et seq.* (42 U.S.C. (& Supp. III) 602(a)(27)).

The CSE program was added to the Act to encourage states to enforce child-support obligations and thereby to reduce the net cost of assistance programs (such as AFDC). Among other things, it provides that, as a condition of federal funding, states must provide child-support enforcement services for all AFDC applicants and recipients. 42 U.S.C. (& Supp. III) 654(4). It also provides that "[t]he support rights assigned to the State under [the AFDC program] * * * shall constitute an obligation owed to such State by the individual responsible for providing such support" and "[s]uch obligation shall be deemed for collection purposes to be collectible under all applicable State and local processes" (42 U.S.C. (& Supp. III) 656(a)). Finally, it provides that the state must implement expedited judicial or administrative processes for obtaining and enforcing support orders, and, at the state's option, for establishing paternity of putative fathers identified in AFDC applications (42 U.S.C. (& Supp. III) 654(20)).

2. Petitioners are seven individuals who, in applications submitted for benefits under the AFDC program, were identified by the mothers of children born out of wedlock as the children's putative fathers (Pet. App. A2-A3). In October 1985, they filed this lawsuit claiming that the Secretary and the state administrators of Oregon's AFDC and CSE programs had failed to provide them with immediate notice that they had been named as putative fathers in those applications and that, as a consequence,

petitioners had been deprived of property and liberty without due process of law (*id.* at A3-A4, C11). Specifically, petitioners claimed that they had been deprived of the opportunity to contest the level of AFDC assistance provided to their putative children and to avoid having child-support obligations accrue prior to the time the state sought to enforce child-support obligations against them (*id.* at A9). They prayed that the district court declare the extant federal AFDC regulations invalid to the extent that they do not require participating states to notify persons that they have been named as putative fathers in AFDC applications, enjoin the federal and state respondents to promulgate specific regulations providing for such notice, and prohibit the state respondents from collecting any support obligations until such regulations have been promulgated (*id.* at C4). At the time they filed this suit, petitioners were defendants in state court proceedings instituted by the State of Oregon to establish their paternity and, pursuant to an assignment of support rights under the AFDC and CSE programs, to collect substantial back and future child-support payments (*id.* at A3).[1]

3. The district court, adopting the findings and recommendations of a federal magistrate (Pet. App. C1-C32), granted the motions to dismiss of both the federal and state respondents (*id.* at B1-B9). With respect to the federal respondent, the district court found, using "state action" principles as an "analog," that there was "no federal action" that could possibly have given rise to a due process violation (*id.* at B5-B7). The court stressed that

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[1] Two of the petitioners acknowledged paternity in the state court proceedings; proceedings against two of the other petitioners were dismissed by stipulation of the parties (Pet. 14). The state trial court decisions dismissing proceedings against the remaining three petitioners are on appeal (*id.* at 14-15).

there is no "federal statute or regulation that requires the states *not* to give notice at the AFDC application stage" (*id.* at B6 (emphasis in original)); that "[t]he United States does not coerce or significantly encourage an omission of notice but leaves the notice procedures to the states" (*ibid.*); and that "[t]he federal government has not preempted the entire field, making it impossible for a state to impose its own notice requirements" (*ibid.*). With respect to the state respondents, the court held that, under abstention principles, dismissal in deference to the pending state civil enforcement proceedings was required (*id.* at B8-B9). It reasoned that "[t]he remedy [petitioners] seek is to preclude collection of accrued child support for the prenotice period" (*id.* at B8) and that "[t]his basis for federal relief could have been raised as a partial defense to the state proceedings to [*sic*] which these [petitioners] are or were involved" (*ibid.*).

4. The court of appeals affirmed (Pet. App. A1-A22). Initially, it noted that "[t]he AFDC statute and regulations leave the responsibility for formulating specific procedures for determining paternity and support obligations to the individual states" and that, "therefore, the Secretary asserts, if [petitioners] were deprived of any constitutional rights, the responsibility for that deprivation must fall on the shoulders of the state [respondents]" (*id.* at A9-A10). "In addressing this issue," the court said that " '[t]he standards utilized to find federal action for purposes of the Fifth Amendment are identical to those employed to detect state action subject to the strictures of the Fourteenth Amendment' " (*id.* at A10 (citations omitted)). Applying those standards, it held that there was no federal action from which a due process violation could possibly be derived (*id.* at A12-A14). The court stressed that "the entire AFDC scheme is designed to leave the states responsible for the specific procedures to be employed [in the

establishment of paternity and support obligations], subject only to broad parameters outlined in the federal statutes and regulations" (*id.* at A13 (citations omitted)); that "[t]he State of Oregon was and is free to adopt procedures to give timely notice to putative fathers, and there is no evidence that its failure to do so was compelled or encouraged in any way by the Secretary" (*ibid.*); and that the state's failure to provide such notice did not require the Secretary to do so, because " '[m]ere approval of or acquiescence in the initiatives of [the state defendants] is not sufficient to justify holding the [Secretary] responsible for those initiatives * * *' " (*id.* at A13-A14 (citation omitted)). The court also rejected petitioners' argument that "there is a compelling need for national uniformity in this area," stating that "there is nothing in the statutory scheme to indicate a 'clear and manifest' intent on the part of Congress to preempt the entire field" (*id.* at A14 (citation omitted)). Finally, it held that, with respect to the claims against the state respondents, abstention in deference to the pending state-court civil proceedings was appropriate (*id.* at B9).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or of another court of appeals. Accordingly, further review by this Court is not warranted.

1. Petitioners' principal argument (Pet. 20-21, 23-40) is that the failure to notify them that they have been named in AFDC applications as the putative fathers of children born out of wedlock deprives them of due process of law. But this Court has long held that the Due Process Clause attaches only where the government has deprived an individual of a cognizable "property" or "liberty"

interest. See *Board of Regents* v. *Roth*, 408 U.S. 564 (1972). Petitioners have not been deprived of any such property or liberty interest.

Contrary to petitioners' suggestion (Pet. 24-27), they have no constitutionally protected interest in being allowed to contest the level of AFDC assistance provided to their putative children. Any child-support obligation that petitioners may have is determined entirely as a matter of state law (see 42 U.S.C. (& Supp. III) 656, 662(b)), and petitioners cannot claim any legitimate interest in avoiding this obligation. See *Rivera* v. *Minnich*, No. 86-98 (June 25, 1987), slip op. 5 ("[P]utative father[s] [clearly] ha[ve] no legitimate right and certainly no liberty interest in avoiding financial obligations to [their] natural child[ren] that are validly imposed by state law."). To be sure, an AFDC recipient who receives state-mandated child support payments may as a result have his or her AFDC benefits reduced. See 42 U.S.C. (& Supp. III) 602(a)(7)(A), 602(a)(8)(A)(vi), 657(b)(1). But the converse is not true: the receipt of AFDC benefits will not reduce or defeat a child-support obligation imposed by state law. Any such result would be inconsistent with 42 U.S.C. (& Supp. III) 657(b), which provides that child-support payments must be used to offset the financial burden that the Federal Government and the states have assumed under the AFDC program. Thus, there is no basis for claiming that petitioners have a legally cognizable interest in the calculation of their childrens' AFDC benefit levels.[2]

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[2] Petitioners cannot properly claim (Pet. 27-28) that their own income and resources are relevant in determining the level of AFDC benefits payable to their putative children. Only the income and resources of those in an assistance unit are considered in determining the assistance unit's benefit level. See 42 U.S.C. (& Supp. III) 602(a)(7)(A). By definition, petitioners are not part of the AFDC assistance unit.

Nor is there any basis to petitioners' claim (Pet. 25-27) that they have the right to advance notification of potential child-support obligations so that they can take steps to avoid the accumulation of large past-due support awards. Petitioners concede (Pet. 12-15), as they must, that the state will not establish their paternity or fix their child-support obligations without first providing them with notice and an opportunity for a hearing. Petitioners nevertheless contend that they are entitled to notification as soon as the state learns that a claim of paternity or a support obligation may be asserted against them in the future. But whether or not it would be wise policy to provide notice of potential liability before it is established,[3] petitioners have cited no authority for the proposition that they have a *property* right in receiving such notice. As a general rule, a plaintiff who has an ongoing claim against a defendant may elect either to file periodic actions for damages, or may allow claims to accrue and sue for damages in a lump sum (provided the statute of limitations has not run). Petitioners have cited no decisions holding that exercise of the latter option by the state, as assignee of a valid claim, deprives them of a property right or otherwise gives rise to a due process claim.

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[3] Petitioners suggest (Pet. 20-21) that advance notification would allow putative fathers to come forward and begin paying their support obligations voluntarily, thereby avoiding the need to pay large lump sums at a later date. But the state could also determine that advance notice might expose mothers or dependent children to retaliation, or might enhance the risk that fathers would leave the jurisdiction or dispose of their assets or take other steps to avoid liability. And the state could also determine that the cost of providing such notice is outweighed by the benefits it would produce, since the state will provide such notice to any father against whom it subsequently determines to proceed, and since a state could reasonably presume that a father who has ignored the foreseeable consequences of his own sexual acts is unlikely voluntarily to assume child-support obligations.

Finally, petitioners contend (Pet. 30) that they have a liberty interest in early notification of their potential support obligations so that they can " 'grasp the opportunity' of parenthood." As an initial matter, we note that this purported interest is somewhat at odds with the relief petitioners seek in this case, which is an injunction against any effort by state officials to enforce petitioners' child-support obligations. Given that petitioners have resisted contributing to the support of their children, even after paternity and child-support proceedings were instituted in state court, they cannot plausibly claim that they are concerned about parenting their children. In any event, this Court has rejected the claim that the existence of a mere biological relationship, without more, is a protectible liberty interest. See *Rivera* v. *Minnich*, slip op. 6 n.7 (citations omitted) (" 'When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," * * * his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he "act[s] as a father toward his children." * * * But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds.' "). Although two of the petitioners have acknowledged paternity (see n.1, *supra*), the most they assert is a biological link to their children; *none* of the petitioners asserts that he has made any effort to establish a genuine parental relationship with his offspring. Thus, there is no cognizable liberty interest in issue here.

2. Even if petitioners had some conceivable property or liberty interest at stake in the AFDC process, there is, as the courts below held, no basis for suggesting that petitioners are due any process from the Secretary.

Petitioners' basic contention is (Pet. 28-40) that the Due Process Clause of the Fifth Amendment imposes an affirmative obligation on the Secretary to promulgate regulations which in turn impose uniform notice requirements on the states. But petitioners have cited no authority in support of this novel proposition. In cases arising under the Administrative Procedure Act, 5 U.S.C. (& Supp. IV) 551 *et seq.*, this Court has expressed great reluctance to compel agencies to engage in rulemaking, even when it might appear useful that they do so. See, *e.g.*, *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974); *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947). The Due Process Clause, which is primarily concerned with securing the right to fair procedures in individual cases, and not with prescribing rules that apply to large numbers of similarly situated persons, see *Bi-Metallic Co.* v. *State Bd. of Equalization*, 239 U.S. 441 (1915), is an even more doubtful source of authority for an affirmative duty to engage in rulemaking.

In any event, petitioners' argument overlooks the fact that the Constitution contains two Due Process Clauses, and that the Due Process Clause of the Fourteenth Amendment is fully adequate to ensure that petitioners are afforded adequate procedural safeguards.[4] Here, although Congress has established general requirements that states must observe if they wish to participate in the AFDC program, the actual administration of the pro-

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[4] Accordingly, petitioners err in asserting (Pet. 38) that federal regulations are required in order to ensure a "uniform and national" notice requirement. The Due Process Clause of the Fourteenth Amendment already imposes a "uniform and national" notice requirement on the states, see, *e.g.*, *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950), and petitioners have not shown how this form of constitutional protection is inadequate to resolve the problems they pose, including notice to putative fathers living outside the forum state.

gram—including specification of the detailed procedures to be followed in naming putative fathers in AFDC applications and in implementing the CSE program—falls to the states. Furthermore, the parental rights and support obligations which are the focus of petitioners' complaint are creatures of state rather than federal law. In these circumstances, any additional procedural safeguards required by due process should be imposed directly on the states through the Fourteenth Amendment, rather than derivatively by the federal government through regulations purportedly required by the Fifth Amendment.

As the lower courts recognized, nothing in the AFDC statute or in the Secretary's regulations stands as an impediment to the assertion of any due process rights that petitioners may have against the state under the Fourteenth Amendment. No "federal statute or regulation * * * requires the states *not* to give notice at the AFDC application stage" (Pet. App. B6 (emphasis in original)); "[t]he United States does not coerce or significantly encourage an omission of notice but leaves the notice procedures to the states" (*ibid.*); "[t]he federal government has not preempted the entire field, making it impossible for a state to impose its own notice requirements" (*ibid.*); and "[t]he State of Oregon was and is free to adopt procedures to give timely notice to putative fathers, and there is no evidence that its failure to do so was compelled or encouraged in any way by the Secretary" (*id.* at A13). In short, as the analogy to "state action" principles employed by the courts below demonstrates, there is no "federal action" here by the Secretary that has deprived petitioners of any procedural protections to which they may be entitled under the Fourteenth Amendment.[5]

[5] A different conclusion does not follow from the "state action" test employed in *Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922 (1982). The

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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"state action" test employed in *Lugar* is the same as the "state action" test employed in *Blum* v. *Yaretsky*, 457 U.S. 991 (1982), upon which the court of appeals in this case relied. Moreover, even under petitioners' formulation of the *Lugar* test—*i.e.*, that "a rule of conduct imposed upon an entity will convert that entity's action into action of the government" imposing the rule (Pet. 42), there is no federal action here that would interfere with petitioners' asserting a due process claim against the states: The Secretary has not imposed a rule on the state barring it from providing notice to putative fathers. For this reason, petitioners also err in suggesting (*id.* at 45-46) that the decision below creates a circuit conflict. The cases cited all involve instances in which a third party has acted in conformity with a government-imposed rule; again, the Secretary has not imposed any such rule on the state in this case.

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